Office Supreme Court U. S.
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FEB 25 1909
JAMES H. McKENNEY,
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No. 108.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, APPELLANTS,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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J. M. CEBALLOS & COMPANY, appellants, v. THE UNITED STATES. } No. 108.

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STATEMENT.

This suit was brought in the Court of Claims to recover compensation alleged to be due appellants by reason of the repatriation of prisoners of war and other persons who were treated as prisoners of war from the Philippine Islands to Spain.

The principal questions to be determined are:

First. The right of appellants to recover for the transportation of the wives and children of Spanish officers at the rate paid for the repatriation of the officers.

Second. The right of appellants to recover for transporting 198 persons from the Philippines to Spain, who were not included in the Quartermaster's requisition for such transportation.

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The findings of fact as made by the court below are set forth at length in the record, pages 25 to 38, inclusive.

ASSIGNMENT OF ERRORS.

Appellants make the following assignment of errors:

First. The court erred in holding that the "wives and children" of Spanish "officers," civil and military, and other noncombatants, such as priests, nuns, sisters of charity, and lady pensioners, although actually "treated" by the United States authorities "as prisoners of war" (Finding IV, Rec., p. 27), were nevertheless embraced in that class described in the contract as "other persons designated by the Secretary of War for transportation," and that they were, therefore, to be paid for at the third-class rate specified in the contract, to wit, $73.75.

Second. The court erred in holding that the wives and children of the Spanish military and civil officers, the nuns, priests, sisters of charity, and other like persons, being in fact prisoners of war, as found by the court (Finding IV), were not properly and legally to be classed as "prisoners of war," and therefore to be paid for at the first-class rate specified in the contract, to wit, $215, when they in fact enjoyed first-class accommodations aboard ship.

Third. The court erred in holding that the wives and children of Spanish officers, civil and military, and other noncombatant prisoners of war, although transported as first-class passengers and afforded cabin accom-

modations aboard ship, were to be paid for at the first-class rate specified in the contract, to wit, $73.75.

Fourth. The court erred in holding that the appellants, Ceballos & Co., were not entitled to be paid for the 198 persons actually carried in the last 15 sailings of ships on the allegation that they were not covered by the quartermaster's requisition, although said persons were actually transported and delivered in Spain in accordance with the provisions of the contract.

Fifth. The court erred in holding that the balance due to the petitioners by the United States for the service rendered under the contract sued upon in this case is $5,391.25, whereas the court should have found that the balance actually due is $293,246.25.

ARGUMENT.

In their adroit and learned brief appellants' counsel assume that the contract in question contains doubtful expressions, is susceptible of different constructions, that the meaning is obscure, and, therefore, an examination of the circumstances, conditions, documents, and other matters is required in order to give a proper interpretation to the language of the contract.

The two principal issues here are: First, as to whether the Government is bound to pay for the repatriation of the wives and children of Spanish officials at the rate paid for the repatriation of commissioned officers, to wit, $215 for each of such per-

sons instead of $73.75. Second, as to whether the Government is bound, under its contract, to pay for the repatriation of the 198 persons not included in requests for transportation at the time of embarkation, as set forth in finding XV.

The specific provisions of the contract bearing upon these issues are clearly and unmistakably set forth as follows:

> The said J. M. Ceballos & Co. hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.
>
> The said company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third class or steerage accommodations, space, and ventilation for the enlisted men and other persons on board each ship; that the subsistence furnished by the company shall be equal in every respect to the United States Army garrison rations. * * *
>
> In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos & Co., for the transpor-

> tation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215) and for each enlisted man, private soldier or other person designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men or persons have been transported, subsisted, and delivered on shore in Spain. * * *
>
> An account of the number of officers, enlisted men or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos & Co., and payment to the said company shall be made upon the basis of the number of officers, enlisted men and persons counted on each ship.

Clearly, the contract provides for everything which the parties undertook to include therein.

The court below, in its opinion, in referring to the contract said:

> By its terms the higher rate was applied to officers only and the lower rate "for each enlisted man, private soldier, *or other person*." Thus there is nothing in the agreement and in the negotiations leading up to the agreement which destroys the effect of the clause fixing the rate on the basis indicated by its language. Indeed, it would seem that the minds of the contracting parties met very clearly when the proposals and the acceptance of the same came to be exactly defined by a written contract.

If there is ambiguity with respect to the compensation for the different persons repatriated, or if there is serious doubt as to the meaning or as to the effect of the language employed in the contract, then the numerous citations of appellants' counsel, under the heading "The controlling principles of construction," are pertinent and applicable to the issues in this case. Therefore, any discussion of these legal principles, which are so well known and, indeed, which have in a large measure had their foundation in the opinions rendered by this court, is unnecessary and superfluous.

However, in order that these well-known principles may be applicable here, it is necessary first for the appellants to convince the court of their necessity; in other words, it is not sufficient to *assume* that the contract is not interpreted by its own terms.

Appellants must make clear that there is ambiguity, uncertainty, and expressions of doubtful meaning found in the language of the contract.

We contend that no such ambiguity exists; that there is no necessity for going beyond the written agreement in order to interpret its meaning; that its provisions are clear and the language used unambiguous and, under a reasonable construction, supports the judgment of the court below. The decisions cited by appellants do not change or modify the law, which is well settled, to the effect that a contract must stand or fall according to its terms as expressed therein.

Where the intention of the parties is deducible from the instrument, the principles of construction,

applying to obscure or ambiguous provisions, are as much out of place as if read into the decalogue.

Counsel for the respective parties, undoubtedly, differ materially as to whether the contract needs any further interpretation than that furnished by the language used within the instrument itself.

We do not differ as to the rules of construction, but as to the necessity of invoking these rules.

It is not necessary for the Government to cite an array of authorities in support of the doctrine that "where the language of a contract is clear and explicit the court will not attempt to construe it," and to the effect that "the courts may not make a contract for the parties, but that their function and duty consist in enforcing and carrying out the one actually made."

This doctrine has been expressed in many different ways and in a variety of arrangement of words and sentences. This court has established the principle in American jurisprudence, and when its application becomes necessary an array of authorities in support of the same would be but redundancy to the enlightened mind of this tribunal.

In *Calderon* v. *Atlas Steamship Company* (170 U. S., 278) Mr. Justice Brown used the following language:

> It is true that in cases of ambiguity in contracts, as well as in statutes, courts will lean toward the presumed intention of the parties or the legislature, and will so construe such contract or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction, and this

> principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. (Ib., 280.)

In the foregoing quotation may be found an epitome of the numerous decisions of this court upon the question of the interpretation of contracts.

We stand squarely upon the proposition that the instrument under consideration in this case, to wit, the Philippine contract, is the only one to be considered by the court, and that its terms are clear and unequivocal, and therefore necessitate no interpretation other than found therein.

THE CONTRACT SPEAKS FOR ITSELF.

The learned judge, in delivering the opinion of the court below, said:

> Thus, there is nothing in the agreement, and in the negotiations leading up to the agreement, which destroys the effect of the clause fixing the rate on the basis indicated by its language. Indeed, it would seem that the minds of the contracting parties met very clearly when the proposals, and the acceptance of the same, came to be exactly defined by a written contract.

> Undoubtedly both parties to the agreement expected the repatriation to include every person on the islands whom the United States regarded as prisoners of war. For plaintiffs now to claim that a rate equivalent to that bid for commissioned officers should be applied to their families would seem unjust to the Government, because the logical conclusion arising from such a contention would be a full rate for every child occupying cabin accommodations as first-class passengers, contrary to the rules and customs governing the transportation of children across the seas at a lower rate than adults. Inasmuch as the rate was not to exceed the sums indicated in the proposals, it is clear that the way was left open for a lower rate than that called for by the advertisement and the proposals in question. It is equally clear that when the parties came to make a contract they agreed that two rates should govern, and it then devolved upon plaintiffs to provide such quarters as should be safe and comfortable for all. Plaintiffs can not now be heard to say that the accommodations for those carried at the lower rate were not safe and comfortable, and before they can collect the officers' rate for the persons not entitled to cabin accommodations they must show that defendants imposed upon them the obligation to furnish more than it contracted to furnish. (Rec., p. 46.)

By reference to the advertisement for proposals (finding VII, Rec., p. 28) it may be seen that bids were invited for the transportation of two classes of persons, namely, officers and enlisted men, and

that cabin accommodations were required for the officers and third-class or steerage accommodations for enlisted men. In answer to the invitation for proposals for such transportation, appellants, through their duly authorized agent, recognized that there were two classes of persons to be repatriated, to wit, officers and enlisted men, and in making their proposal agreed to perform the service at a price not to exceed in any case—

For each officer	$215.00
For each enlisted man	73.75

The treaty of peace between the representatives of the Governments of the United States and Spain, of date December 10, 1898, provided in part as follows:

> The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces.

And in Article VI, which reads as follows:

> Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.
>
> Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

> The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article. (Finding IX, Rec., p. 30)

The contract based upon the terms of the treaty provides for the transportation of the two classes which were contemplated in the advertisement and proposals, and it was agreed that appellants would provide comfortable transportation of the prisoners of war and such other persons as "may be designated by the Secretary of War, *with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men and other persons on board each ship.*"

It was further agreed that appellants undertook the transportation, subsistence, and delivery on shore of such persons upon the following terms, to wit:

> For each commissioned officer..... $215.00
> For *each enlisted man, private soldier, or other person* designated by the Secretary of War for transportation..... 73.75
>
> the said sums to be due and payable upon evidence that said officers, enlisted men, or other persons have been transported, subsisted, and delivered on shore in Spain. (Finding IX, Rec., p. 31.)

In so far, then, as compensation is concerned, the entire body of persons to be transported were divided by the contract into two general classes; the first class, clearly set forth as commissioned officers, $215, and

all other persons to be repatriated, whether they were enlisted men, private soldiers, or other persons designated by the Secretary of War for such transportation, may be designated as the second class of this general division, the second class to be transported for $73.75 each.

No play upon words, no subtle or adroit attempt at construction, no labored effort to distract the mind from the plain and clear terms of this contract, should be permitted to inject therein ambiguity, obscurity, indefiniteness, or an element of doubt. The provisions stand out clear and forceful, clothing the entire instrument with the power of self-interpretation, and any other document or circumstance injected, in an attempt at more clearly elucidating the terms of the contract as now existing can but serve to becloud its unmistakable provisions.

THE CUBAN CONTRACT.

Appellants made a motion in this court for an order requiring the Court of Claims to make additional findings, setting forth therein the findings requested, in effect, to wit, that the court below be required to find that the Government had entered into a contract with the appellants for the repatriation of prisoners of war from Cuba to Spain, and also to find as to what compensation had been paid by the Government for such repatriation. To this motion and argument thereon filed by appellants the Government filed suggestions in opposition thereto on the grounds,

First. That the record before this court fails to show that appellants made any request to the Court of Claims for the findings as set forth in their motion;

Second. That the record before this court fails to show that appellants filed any motion in the Court of Claims for a new trial or that they made an application to said court to amend its findings or to make additional findings;

Third. Because the record before this court fails to show due diligence on the part of appellants in filing the motion herein; and

Fourth. For the reason that the additional findings which appellants required of the Court of Claims are immaterial to the consideration of the case by this court and have no bearing upon the final result.

These objections are supported in the brief filed by the Government, which need not be here reproduced.

Upon consideration of the motion this honorable court deferred its decision thereon until the whole case was presented on its merits. Notwithstanding this action of the court, appellants' counsel see proper to enter into a full discussion of the so-called "Cuban contract" and the payments made thereunder. The Cuban contract is mentioned some seventeen or eighteen times in their brief herein, and on pages 10 to 13, inclusive, a copy of the same is set forth.

We contend that this so-called "Cuban contract" has no place in the proceedings in the case at bar. Its provisions are entirely different, and relate to a different subject-matter. If these appellants have

any standing in this court, or in the Court of Claims, they must find its basis therefor in the Philippine contract, and not in the Cuban contract. It is with some serious doubt that we make any further mention of the terms of the Cuban contract in this discussion. Viewing the matter as we do, as having no proper place or legal standing in the case at bar, it would not appear seemly to enter upon a lengthy discussion of the terms of said Cuban contract or its fancied relation or imaginary connection with the contract which is the foundation of this suit. We, therefore, shall dispose of the Cuban contract by pointing out that its terms uphold and strengthen the Government's position in this case.

By reference to appellants' brief (p. 11), wherein the Cuban contract is set out, it may be seen that all of the troops of Spain that were surrendered by General Toral to the United States in Cuba were to be transported to such port in Spain as the Secretary of War might designate, and that the United States Government would pay for such transportation and for the subsistence and delivery on shore of "the prisoners, the sum of twenty dollars ($20) for each enlisted man or private soldier, and the sum of fifty-five dollars ($55) for each officer so delivered." The contract further provides "that cabin accommodations are to be supplied for the said officers, and third-class or steerage accommodations, having suitable galley accommodations with ample space and ventilation, for the enlisted men or privates."

The term "other persons" was not mentioned in this contract and no provision was made for the repatriation of the officers' wives, children, or other persons. In the settlement made, however, with the War Department for transportation under this contract, it is contended by appellants that the Government paid for officers' wives and children at the same rate which the contract provides shall be paid for officers themselves, and appellants seek to introduce this circumstance as an important element in interpreting the provisions and terms found in the contract on which this action is based.

Whether a proper construction was given to the Cuban contract with reference to the payment for wives and children of officers is not a question to be litigated in this case. Whether the government officials paid a claim made under the Cuban contract which could not be enforced in the courts is not here for consideration; neither is the object nor purpose of paying the claim to be determined here. Whatever may have actuated the officials in making or interpreting the Cuban contract, one thing is clear and stands out prominently in this transaction, namely, that in making a subsequent contract with the appellants for the repatriation of the Philippine prisoners Secretary Alger did not leave the question of payment for the transportation of officers' wives and children open for speculation. He provided against claims being successfully made for such repatriation at the officers' rate by inserting the wise provision in the Philippine contract, which was not in

the Cuban contract, to wit, that the appellants should transport, subsist, and deliver on shore such persons to be repatriated at a compensation of $215 for each commissioned officer and $73.75 "*for each enlisted man, private soldier, or other person designated by the Secretary of War for transportation.*"

The contract in question in this suit was made over six months after the Cuban contract. The Government officials had the benefit of their experience with these appellants, wherein they demanded under the Cuban contract the higher rate for transportation of officers' wives and children, and in the light of that experience Secretary Alger evidently determined that no such claim could be justly made under the contract providing for the repatriation of the Philippine prisoners. He therefore classed for the purposes of pay and compensation the persons to be repatriated into the two general divisions we have heretofore given, namely, commissioned officers in one class, and enlisted men, private soldiers, or other persons designated by the Secretary of War in the other class. The two contracts being different in vital particulars, the Cuban contract is of no practical aid to counsel or the court in construing the Philippine contract, especially in view of the clear and unequivocal language used therein. *If any aid is furnished it is to the extent that, in view of the defects of the first contract, provision was made in the second contract to cure such defects and to provide for a class of persons not designated in the Cuban contract.*

The doctrine of *judicandum est legibus, non exemplis* is as forceful now as at any other time during the history of jurisprudence. Appellants' counsel, however, ignore this principle in their search for precedents and examples for payment at the higher rate for repatriation of officers' wives and children.

THE PRIMARY OBLIGATION OF THE UNITED STATES WAS TO REPATRIATE SPANISH SOLDIERS TAKEN AS PRISONERS OF WAR.

The contract in question, we think, clearly differentiates between the class as combatants and noncombatants, and whether the designation "prisoners of war" was or was not intended to embrace "other persons," or "all other persons" or "such other persons as may be designated by the Secretary of War," is not important. By reference to the treaty it will be seen (Rec., Art. V, p. 30) that the United States agreed to send back to Spain, at its own cost, "Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces," thus indicating that the Government's conception of its duty, as expressed by the treaty, was to repatriate the combatant or soldier class, and in said Article V no other class is mentioned.

In Article VI of the treaty (Rec., p. 30) it is provided that Spain will release all "prisoners of war" and "all persons detained or in prison for political offenses in connection with the insurrection in Cuba and the Philippines and the war with the United

States." It is further provided in Article VI that the Government of the United States will, at its own cost, return to Spain prisoners released or caused to be released, respectively, under the treaty. It will thus be seen that the primary obligation of the Government was to repatriate "Spanish soldiers taken as prisoners of war" and applied particularly to the military or combatant class and not, as contended by the appellants, to the wives and children of the military officers.

It is possible there was some obligation on the part of the Government to repatriate the noncombatant class, but that obligation is not comparable with the primary one, which this Government assumed with reference to the repatriation of the military or combatant class.

In the contract, following the citations and quotations from the treaty, reference is made to the "transportation of prisoners of war" and "prisoners of war and other persons," but such expressions are not in any way inconsistent with the primary obligation of the treaty, namely, to send back to Spain the Spanish soldiers taken as prisoners of war.

The vital part of the contract is the clause fixing the compensation for the transportation of the various persons named therein, and its language seems to be simple, plain, and easily understood. The officers' wives and children were not assigned to any quarters or any part of the ship by the United States officials. The Government's duty was per-

formed under this contract and under the treaty when it delivered the parties to be repatriated to the vessels provided therefor, and there was nothing to prevent an officer making provision on shipboard for his wife and children and paying the extra compensation, if he so desired. The Spanish Government, under its subsidy contract with the steamship company, paid the difference between the lower and higher rates for the transportation of the officers' wives and children, thus recognizing its obligation in the premises, concerning which the United States had no part.

As a matter of fact, aside from the officers and soldiers, none of these people were bearing arms against the United States Government. They were in the Philippines, however, either as dependents of the officers and soldiers, or in some way connected with the former Government, or the church and through it with the state, and when it came to a matter of repatriation all were sent back to Spain by the United States in strict conformity with this contract; and for this purpose of repatriation they were all "treated as prisoners of war." However, when it comes to the question of payment for such repatriation then the contract provides for a classification, as heretofore seen.

If appellants are correct in their contention, it necessarily follows that the wives and children of officers must be considered as officers and, therefore, prisoners of war.

THE ORAL CONTRACT.

The oral contract which preceded the one reduced to writing was held by the Court of Claims to be in all respects identical with the written contract under consideration, and it was so agreed between the parties thereto.

Appellants contend that in this oral contract a precedent is found for payment by the Government or recognition of the right of appellants to demand payment at the rates here claimed. (Appellant's brief, pp. 30–31.) The facts, circumstances, and communications bearing upon the oral contract and upon the repatriation of such persons as were transported before the written contract was signed are fully set forth in the record. There is nothing in these negotiations or in the transactions thereunder to indicate that the Government bound itself in any way to pay for the officers' wives and children at officers' rates. In fact, no specific mention was made of officers' wives and children, and it is only by implication that they may be included in the language used in the correspondence which referred to "Spanish prisoners of war" and "sick Spanish officers and prisoners of war."

It may be true that the persons thus transported under the oral agreement were treated as prisoners of war, but when it came to the matter of settlement with the Government for this transportation a classification for payment was made on the basis contended for by the Government.

The proposals and appellants' bids do not seem to have had reference to noncombatants or nonmilitary class (Rec., findings VII and VIII), and no reference is made to any other class of passengers than officers and enlisted men. But when the contract was prepared and signed particular mention was made of "other persons" as contradistinguished from officers and enlisted men. This indicates clearly that it was in the minds of the contracting parties to include in the contract and make specific provision for those Spaniards who were in the Philippines, but who did not properly belong to the military class, although in a certain sense they perhaps might be designated as "prisoners of war." Hence such persons who were tendered to the steamship company and carried by it were properly designated as "other persons," thereby distinguishing them from the officers and enlisted men who had a military status.

ANALYSIS OF APPELLANTS' BRIEF OF ARGUMENT.

The learned counsel for appellants present their argument under three separate heads. We quote from their brief as follows:

POINTS.

FIRST POINT.

> It was clearly the intention of the parties to provide for the transportation from the Philippine Islands to Spain of two distinct classes—first, of all Spanish "prisoners of war," "and," secondly, of "such other persons as may be designated by the Secretary of War."

"Wives and children" were "treated" by both parties throughout "as prisoners of war," and not as "such other persons," within the description of the contract.

It is also equally clear that it was the intention of the parties that the "wives and children" in question should have precisely the same accommodations and be transported at the same rates as those provided for their husbands and fathers, who are classed as "officers," and the words of the contract must be so construed as to effectuate such intention.

On this point, the practical construction to this effect, placed by the parties upon the identical terms of the Cuban contract in this behalf—a contract between the same parties, concerning the same general transaction and subject-matter—and also upon the original oral Philippines agreement, is absolutely conclusive.

The Court of Claims, therefore, erred in sustaining the Government's contention, and classing officers' "wives and children" as "such other persons," who were entitled to only steerage accommodations, at third-class rates.

(Appellants' brief, pp. 14–15.)

Under this heading appellants' principal argument is to the effect that there were but two distinct classes of passengers intended to be transported under the treaty of Paris and the contract, as follows:

First. "Spanish prisoners of war."

Second. "Such other persons as may be designated by the Secretary of War."

This classification, appellants contend, is justified from the protocol, the treaty, the contract, the language used by the Court of Claims, the oral agreement that preceded the written contract in question, and by the so-called Cuban contract.

This search for "other persons" involves appellants in a somewhat extended argument. Whence are these "other persons" to come if they do not include officers' wives, children, civil officials and their families, civilians, priests, friars, nuns, nurses, sisters of charity, and all the lists so specifically set out in appellants' brief? Mention of them does not appear in the record. The Court of Claims failed to find any "other persons," except among those classed by appellants as "prisoners of war;" the military authorities of the United States also failed in this respect, and the accounting officers were equally unsuccessful, save only as "other persons" are embraced in the schedule as found by the Court of Claims. But appellants have discovered a class of persons which it is contended fall within the scope of the term "other persons," as used in the contract. These "other persons" are certain ecclesiastics and Spaniards who were constantly abusing and criticising the United States and who were supposed to be rendering valuable aid to the insurgent cause in the Philippines. Within this class of "other persons" appellants catalogue "Spanish editors," "Spanish influences," "ecclesiastical influences," "obnoxious persons," "ecclesiastical corporations," "bad Spaniards," "exploit-

ers," "riffraff," and finally "flotsom and jetsam of Spanish population." None of these are found in the record, but are taken from the writings of Aguinaldo, report of the Philippine Commission, report of Major-General Otis, newspaper editorials, and other sources. This court is asked to take judicial notice of the foregoing alleged persons, who are assigned by appellants as falling within the second division into which they have classified the various persons transported.

It is perhaps too much to assume that Aguinaldo was an altogether unprejudiced authority in respect to the estimate of either the reputation or character of individual Spaniards. It is significant that none of these persons characterized as "riffraff," "flotsam and jetsam," "bad Spaniards," "exploiters," etc., were transported or repatriated under the contract. The record is as silent as the tomb concerning the repatriation of any such people. Indeed, it precludes the possibility of any such persons having been repatriated, for the reason that it expressly sets forth who were transported under the contract, and none of the class mentioned are included therein.

If the Secretary of War thought to dispose of such undesirable persons and in the contract made a class therefor under the head of "other persons," as contended by appellants, he certainly failed in taking advantage of the terms of the contract with respect to their repatriation.

Appellants attempt to differentiate between the Spaniards in the Philippines and the Spaniards in

Cuba, but so far as the record shows, and from the history of the Spaniards in both islands, there is nothing to justify this attempt at differentiation. These comparisons of the Spaniards in the Philippines with the Spaniards in Cuba have no bearing upon the issues in this case, and we fail to find the purpose to be subserved by the court taking judicial notice of this so-called "dangerous element" in the Philippines. We therefore refrain from giving expression to our estimate of the individual characteristics of the Spaniards in both islands. The history of the Spanish occupation and government of those islands is written for all time, and, so far as we are concerned, appellants' counsel and the Spaniards who occupied Cuba may have all the comfort to be derived from the comparison drawn by appellants.

In their most able and learned brief appellants reach the culminating point in *finesse* and *technique* in arriving at their interpretation of that portion of the contract relating to the compensation for repatriation. As an illustration of this we take the liberty to quote as follows:

> The "wives and children" of "officers," both civil and military, were, presumably, of gentle breeding and refinement, and were doubtless, many of them, persons of a high degree of rank and culture. Spain, it will not be forgotten, is a monarchy of the old school, in which there persist, even to-day, with startling emphasis, the ancient aristocratic distinctions of rank between the different classes of the population. Many of the Philippines

civil and military officials, it is well known, were persons of rank and distinction. Spain had been in occupation of the islands for centuries, and, that long occupation now being brought to an end, the whole civil and governmental establishment—not merely the army of occupation—was to be returned to the mother country as "prisoners of war." There was the necessary accumulation, as a part of the ancient, aristocratic régime, of many officials, civil and military, of aristocratic rank, with their families. It might well have been that members of the royal family or household might have been caught in this predicament at Manila. Their situation would have been precisely the same as that of the President of the United States and his family placed in similar circumstances.

* * * * *

So, too, as we have heretofore intimated, it is absolutely unreasonable to impute to the parties an intention to separate and divorce husbands and fathers, the "officers" in question, from their "wives and children." In other words, where the "officers" were carried, there we must assume that the parties intended that their "wives and children" should be carried also. It could not have been intended needlessly to separate families on this long, hot, and dangerous voyage, especially families who were being carried to their homes in Spain. We may take it for granted that accommodations were dependent upon station in life and standard of living; that the dictates of humanity and the usages of civil-

ized society were to prevail; and that, if the father and husband was to be carried in the cabins, there it was intended that his wife and his children should follow him. So, again, if the husband and father was an "enlisted man," to be carried in the steerage, there, obviously, it was the intention that his wife and his children should likewise follow him.

The Government's contention necessarily involves such an imputation of intention thus to separate families, placing the more delicate and sensitive members, "the wives and children," in the steerage, in violation of all known usages and of all human feelings, and the husbands and fathers in the cabins. As we have said, this is wholly unreasonable and unnatural, especially in view of the character of the voyage in question, and the quantity of filth, and the utter degradation of the personal associations, in the average steerage accommodations. (Appellants' brief, pp. 47, 48, 49).

Again quoting from appellants' brief:

> It seems to us to be a most unworthy argument to suggest that because the United States did not specifically assign accommodations it is not bound to pay therefor under an *express contract* like that in question. We are *not* suing upon a *quantum meruit*. (Ib., p. 54.)

We beg leave to suggest that this case is not being tried on either sympathy or sentiment. It has its foundation in the Philippine contract and in no other. The "ancient aristocratic distinctions of rank" are not recognized in the contract, neither was the

agreement prepared with reference to any particular "persons of a high degree of rank and culture." It was not prepared with the view of comporting with the rules, regulations, and court etiquette of the ancient Kingdom of Spain. Active warfare had ceased and, in accordance with the protocol between the two countries, the United States authorities attempted to faithfully carry out the treaty in entering into the contract. They provided for comfortable and safe transportation and subsistence for the officers at $215 and the enlisted men and all other persons at $73.75 each. The contracting parties did not consider the question of royal privileges.

The Court of Claims expressly found as follows:

> If any persons other than officers were given cabin accommodations, the United States did not assign or place such persons in the steamers' cabins.
>
> *It does not appear* from the evidence in the cause that the United States assigned or designated cabin accommodations for the commissioned officers or the wives and children of the commissioned officers.
>
> *The evidence does establish* to the satisfaction of the court that when the wives and children of the military and civil officers of the Spanish army in the Philippine Archipelago went on board the plaintiffs' vessel the plaintiffs made no claim that the United States should pay for the wives and children of such commissioned officers at commissioned officers' rates. (Rec., p. 32, finding X.)

This finding, we may assume, was made by the court after considering all the evidence presented and all the statements of the circumstances connected with the transaction which were admissible in evidence. It is a proper finding, and under the practice of this court is not susceptible of change, variation, or obliteration by appellants' microscopic analysis.

The statement quoted from appellants' brief (p. 54), to the effect that they are not suing upon a *quantum meruit*, but upon an express contract, does not seem to be in accord with their statement found on page 68 thereof, which reads as follows:

THIRD POINT.

> If the construction of the contract for which appellants contend is rejected, then, since it appears that the "families"—"wives and children"—were actually "delivered" by the United States to the appellants for transportation, and were thereafter in fact transported in the cabins, the appellants are entitled to recover upon a quantum meruit a reasonable compensation for the service thus performed. In that view the minds of the parties had met on everything except the compensation, which, however, may reasonably be measured by that stated in the contract for cabin accommodations, no other evidence having been adduced.

On page 62 of appellants' brief they use the following language:

> *This is an action upon an express contract with the United States.*

We agree with appellants in this statement, but leave to them the necessary explanations as to the theory upon which they can possibly recover under a *quantum meruit*.

APPELLANTS' ATTACK ON THE FINDINGS OF THE COURT.

Appellants attack the findings of the court under the head of "Certain unimportant and immaterial findings of the court below." (Appellants' brief, pp. 61–63, inclusive.)

The findings which the plaintiffs term "unimportant and immaterial" were made on the evidence which supports these findings, and it may well have attracted the attention of the court, especially in view of the remarkable admission found in the record (p. 1) wherein it is stated that appellants "were and are the American operators of the Spanish Transatlantic Line of steamers engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands, upon the vessels of which all the repatriated Spanish prisoners were transported from the Philippine Islands to Spain."

Again, in answering the advertisement of General Luddington, appellants, through their agent, stated:

> SIR: In accordance with the advertisement of Gen. M. I. Luddington, Quartermaster-General U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Co., agents of the Compañia Transatlantica de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. (Rec., p. 5.)

These quotations, as may be seen, are taken from the plaintiffs' petition filed in the Court of Claims, August 15, 1903. And in the second amended petition, filed October 31, 1903, the proposal of Ceballos & Co., is again set forth through their agent , as follows:

> I propose, on behalf of Messrs. J. M. Ceballos & Co., agents of the Compañia Transatlantica de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. (Rec., p. 16.)

Were it proper so to do, we would gladly accompany appellants in an investigation and analysis of the testimony which the court found to support the findings which appellants say are "unimportant and immaterial."

The admissions of appellants, their proposal in answer to the Government's advertisement, and the findings of the court bring them within the twilight zone of agency and so intimately connect them with the steamship company that some emphasis may be placed upon the following finding of the Court of Claims:

> The Compañía Transatlántica sent to the Spanish Government its bill made in accordance with the rate fixed in its contract for the certain transportations which are now claimed in this suit; and the sums for which suit is now brought against the United States herein have all been settled and paid by the Spanish Government to the Compañía Transatlántica in Spain. It does not appear that the claimants, Ceballos & Co., have been obliged to pay the balances for which this action is

> brought, or any of said balances, to said Compañía Transatlántica or that plaintiffs have incurred any liability therefor. (Rec., p. 26.)

The first finding of fact (Rec., p. 25) shows the contractual relations which existed between the Compañía Transatlántica Steamship line and the Government of Spain, and in the opinion of the court (Rec., p. 47) may be found the very significant language:

> Assuredly plaintiffs ought not to expect a judgment in their favor for the part paid by Spain to the Compañía Transatlántica for coming into the matter to make more easy the journey to the peninsula for the women and children. In no event are plaintiffs entitled to anything for the service performed by others and paid for by Spain with neither compulsion nor request.

The invitation for proposals contains the statement "The United States Government will deliver the prisoners on board the vessels at Manila." The Government's duty was discharged on delivering the prisoners on board the various ships and, as found by the Court of Claims, the government officials did not assign the persons transported to either the cabins or steerage. Appellants had the disposition and location on the ships of those repatriated. It would, therefore, seem an unusual proceeding to permit them to select any number they might choose in addition to "commissioned officers" for cabin accommodations to be paid for at the higher rate.

FOURTH ASSIGNMENT OF ERROR.

For their fourth assignment of error appellants allege:

> The court below erred in refusing to allow the claim for 198 persons actually carried to Spain merely because, as the court erroneously assumed, they were not represented by so-called "quartermaster's requisitions." (Claimants' brief, p. 63.)

The court found as a fact that these 198 persons for which appellants now insist upon payment for repatriation were not represented by quartermaster's requisitions. The method of counting those entitled to transportation under the contract was changed in the last fifteen shipments, so that the requests for transportation with reference to available space should be made upon the appellants, and thereupon a requisition for transportation be issued by the United States quartermaster at Manila. (Rec., pp. 35, 36.) The full circumstances of the shipment of these 198 persons are set forth in finding XV of the record.

The appellants, however, claim to have found a slight error in the table appearing on pages 34 and 35 of the record, and from this error they question the authority of the court to state that these 198 persons were not included in requests for transportation. The error is immaterial and arises as follows:

In Finding XV (Rec., p. 34) the entire list of passengers (for whose transportation appellants hold the United States responsible) embraced in the last 15 shipments are included in one finding and one table,

making (of all classes) 1,971 persons. This finding is headed as follows:

> Of the last 15 shipments of prisoners of war running from February 20, 1900, up to July 14, 1901, the list of passengers shipped as shown by requests for transportation and quartermaster's requisitions (based on requests from the Spanish authorities) is as follows:

Then follows the list embracing the various classifications; in fact, all the passengers carried on the 15 vessels, and for whose passages the Government was by the appellants held liable.

This list erroneously contains the 198 passengers for which the Government refused to pay, because (1) not included in requests for transportation; and (2) not counted at the time of embarkation, as required by the contract.

That the inclusion of these 198 persons in the list contained in Finding XV is plainly an error is conclusively demonstrated and corrected in a later portion of the same finding wherein it is stated (p. 35), after giving the full list of 1,971 persons covering the last 15 shipments:

> Upon the above shipments the Auditor of the War Department made the following allowances:
>
> Officers (which included civil officials of the class of military officers), 184, at $215 each.
>
> Enlisted men and other persons, 1,589, at $73.75 each.
>
> And disallowed payment for the following persons because not called for and not in-

> cluded in requests for transportation of the claimant company at the time of embarkation.

Here follows the list which totals 198.

Next following this statement in the same finding:

> Making 198 persons in all whose passages were not allowed for by the Auditor of the War Department for the reason that they were not included in requests for transportation.

Later in the same finding (p. 36) occurs the statement:

> The 198 persons now claimed for were not included in the count at the time and place of embarkation.
>
> No objections were offered at the time of the charge in the method of computing the number of persons to go aboard by the plaintiffs.

The accounts presented to the Treasury for payment asked compensation for 198 persons, according to a certificate in form and figures set forth in finding 15. (Rec., p. 37.)

This is referred to by the court as a form of requisition for transportation used on the 14 ships besides the *Leon XIII*, but on different dates, "according to the time of sailing, and embraced officers, enlisted men, and other persons on which the count was made."

Following this appears the statement (p. 37, finding XV):

> The evidence does not establish to the satisfaction of the court that these 198 persons

> certified to by the American consul at Barcelona were prisoners of war, entitled to transportation under the contract.

But if any doubt lingered as to this matter, that doubt is dispelled by finding XVII (Rec., p. 38), which states:

> The total number of prisoners of all classes delivered by the United States aboard ship for which there were quartermaster's requisitions and transported by the petitioners, in accordance with the two contracts (one of which was oral and the other of which was in writing, and set forth herein) was 17,305—that is to say, 1,938 military and naval officers and 15,367 enlisted men and other persons.

The latter statement, excluding as it does the 198 persons whose passage was not allowed by the auditor because not included in the requests for transportation and not counted at the time of embarkation, makes the meaning of the Court of Claims perfectly clear, notwithstanding the slight error which crept into its finding.

Whatever the method of counting may have been prior to the last 15 shipments, the counting as to those shipments was strictly in accordance with the terms of the contract, which reads as follows:

> The account of the number of officers, enlisted men, and other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of said J. M. Ceballos & Co., shall be made upon the basis of the number of

officers, enlisted men, and other persons counted on each ship.

The clear and lucid argument in the opinion on this branch of the case is all that need be urged on behalf of the Government. (Rec., pp. 23, 24.)

THE DOCTRINE OF QUANTUM MERUIT WITHOUT APPLICATION.

As heretofore stated, the third contention is that appellants are entitled to recover upon a *quantum meruit*, which claim we think entirely inconsistent with that made by appellants, to which we have referred in another portion of this brief. But the doctrine of *quantum meruit* is not applicable in this case, as clearly pointed out by the court below in the following language:

> The cause of action is on the express contract embracing all repatriations undertaken. There is nothing in the transactions of the parties outside of the express agreement to indicate that compensation for any service to be performed by plaintiffs was contemplated, or that they could perform any service which should be paid for on a different basis than that expressed in the writing. There is, therefore, no room to invoke quantum meruit. As said in *Hartman* v. *United States* (40 Ct. Cls. R., 133), "the express written agreement excludes the possibility of implied contract;" and that the minds of the parties met when they formulated their written agreement for the lower rate to include women and children seems clear from the prevailing conditions to be

> gathered from the official correspondence, which shows that early doubts existed as to who were to be regarded as prisoners. But the parties proceeded upon the assumption that civil officials and women and children were to go and constructed their agreement accordingly. * * * The repatriation of women and children alone involved an expenditure of several hundred thousand dollars by this Government, and as the matter stands it seems just for it to end. (Rec., pp. 46, 47.)

It has been frequently held by this court that a claim can not be supported upon an implied promise where the record shows the express contract to be in full force and operation. In *Hawkins* v. *The United States* (96 U. S., 967) Mr. Justice Clifford, speaking for the court, said:

> Express stipulations can not in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned or has been varied by the consent of the parties. Hence the rule is that if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done or for money paid must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he can not recover under such circumstances upon a *quantum meruit*. (1 Story, Contr. (5th ed.), sec. 18; *Selway* v. *Fogg*, 5 Mees. & W., 83; *Creighton* v. *City of Toledo*, 18 Ohio St., 447; *Weston* v. *Davis*, 24 Me., 374,

Whiting v. *Sullivan*, 7 Mass., 107; *Merrill* v. *The Ithaca and Owego Railroad Co.*, 16 Wend., 586; *Glacius et al.* v. *Black*, 50 N. Y., 145.)

When a special contract for work and services has been abandoned and put an end to, if the employer has derived some benefit from work done under it he may be made liable upon an implied promise to make reasonable remuneration in respect to such work. (*Burns* v. *Miller*, 4 Taunt., 745; *Inchbald* v. *Plantation Company*, 17 C. B. N. S., 733; *Bartholomew* v. *Markwick*, 15 C. B. N. S., 711; Addison, Contr. (6th ed.), 23.)

Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party can not be bound by an implied promise when he has made an express contract as to the same subject-matter; which is certainly sound law, unless the express contract has been rescinded or abandoned. (Chitty, Contr. (10th ed.), 62; *Toussaint* v. *Martinnant*, 2 T. R., 100; *Cutter* v. *Powell*, 6 id., 320; *Ferguson* v. *Carrington*, 9 B. and C., 59; *Atherton* v. *Dennett*, Law Rep., 7 Q. B., 327.)

Applying this doctrine to the case at bar, it would seem that the claim based upon *quantum meruit* is without support. The express contract had not been abandoned. It was alive and recognized as in active operation by both parties thereto, and in the whole record there does not appear the slightest basis upon which to rest a reasonable contention for

recovery upon any ground other than is contained in the written agreement.

The court below found nothing in the transactions outside of the express contract to indicate that the Government was obligated to pay for any service on a different basis than that expressed in the contract, and this agreement, this *aggregatio mentium*, forever closed the right of appellants to recover under the doctrine of *quantum meruit*.

From the viewpoint of Government's counsel appellants seek to reverse the universal rule governing the interpretation of contracts, namely:

First. That the primary object is to comprehend the intention, understanding, and agreement of the parties to the contract; and

Second. That this intention must, if possible, be ascertained from the instrument itself.

If the rule is to be reversed and every circumstance and statement, however remote, taken into consideration in connection with the clear and express terms of the contract, then no contract can be prepared with certainty or precision. Agreements in writing between parties, however explicit, clear, and concise the verbiage used therein, can be rendered ambiguous, uncertain, vague, and meaningless by foreign writings, expressions, circumstances, and conditions remotely adverting to the subject-matter in which the contract finds its inception.

We do not believe the courts will yield in the slightest degree to this recession from the well-recognized rules governing the interpretation of

written agreements. This court is the highest authority for these well-established principles and, in the application of the law, has always sustained the maxim *Contractus legem ex conventione accipiunt.*

The express terms of the contract in question are sufficient within themselves to apprise the court of the agreement and intention of the parties, and the law applicable to the contract finds its inception in the nature of the instrument.

We think the United States Government has faithfully discharged the obligation resting upon it under the terms of the contract.

HAS THE COURT OF CLAIMS JURISDICTION?

In the act providing for the jurisdiction, powers, and procedure of the Court of Claims may be found the following section:

> SEC. 1066. The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.
>
> (Revised Statutes of the U. S., 2d ed., p. 197.)

Does this claim grow out of the treaty between the United States and Spain, commonly known as the treaty of Paris, within the scope of the statute just quoted? The Court of Claims (Rec., p. 44), in its opinion, states that it does not.

The question of jurisdiction, of course, may be raised and considered by counsel at any stage of the proceedings, or may be considered and determined by the court itself without the matter having been suggested by counsel for either party. Throughout the record, as we have heretofore shown, there is abundant evidence of close relations between the Government of Spain in entering into its so-called subsidy contract with the Compania Transatlantica Steamship Line. Indeed, Finding I shows that these relations existed between the Government of Spain and the steamship company beginning in 1887 and not ending until 1907. The record, furthermore, as we have seen, intimately connects these appellants with the steamship company. It is by reason of the treaty and its terms that the contract in question ever had any existence, and if we give the ordinary construction to the statute quoted, there may be a serious question as to the jurisdiction of the court below to hear, consider, and determine the matters in issue in this case.

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